No. 86-523

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In the Supreme Court of the United States

OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, INC., AND ROGER LOVE, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a magistrate's finding that probable cause justified the issuance of an inspection warrant under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, may be challenged on the basis of evidence that was not before the magistrate, in the absence of a showing that the warrant application contained either an intentional misstatement or a misstatement made in reckless disregard of the truth.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 791 F.2d 1535. The opinions of the district court (Pet. App. D1-D5, E1-E5) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on June 25, 1986, and a petition for rehearing was denied on July 30, 1986 (Pet. App. C1-C2). The petition for a writ of certiorari was

filed on September 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 16, 1983, an Occupational Safety and Health Administration (OSHA) compliance officer applied to a federal magistrate for a warrant authorizing an inspection of the manufacturing plant operated by petitioner Mosher Steel Company in Birmingham, Alabama. The warrant application contained an affidavit from an employee of the Birmingham area OSHA office stating that Mosher Steel's plant had been selected for inspection pursuant to a programmed health inspection plan that provided for periodic inspections of places of employment. The affidavit described the manner in which the plant had been selected for inspection and a copy of the OSHA inspection plan was attached to the affidavit. Pet. App. A1-A2; R. 7-26.[1] The magistrate found that the Secretary had established administrative probable cause to search Mosher Steel's plant and issued the warrant. Mosher Steel refused to honor the warrant. Pet. App. A2, E2-E3.

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[1] The affidavit explained that "Mosher is believed to have a primary SIC [Standard Industrial Classification] of 3441 (Fabricated Structural Metal) which * * * ranks 28th of the 250 most hazardous industries in the State of Alabama, is believed to employ approximately 250 employees, and has not undergone a complete OSHA inspection since June 1976" (R. 11). ("R." refers to the record filed in the court of appeals.) It stated that an inspection of Mosher Steel was indicated "because of its sequence number of 128 of 459 on the Birmingham cycle one [inspection] list" (*ibid.*) and that Mosher was scheduled for inspection during the week of April 22, 1983 "because Mosher was the next employer on the cycle list in geographic proximity to the Area Office" (R. 12).

The Secretary instituted civil contempt proceedings in the United States District Court for the Northern District of Alabama based upon petitioners' refusal to permit the inspection authorized by the warrant. Petitioners filed a counterclaim for a declaratory judgment, alleging that OSHA's entire programmed inspection plan is unreasonable and discriminatory and violates the Fourth and Fifth Amendments. Petitioners served a subpoena duces tecum to depose the OSHA supervisor responsible for scheduling the inspection of Mosher Steel; the subpoena also sought the production of a variety of documents relating to the design and operation of the inspection plan. Pet. App. A1, E2.[2]

The Secretary moved to quash the subpoena and sought a protective order barring all discovery; he contended that discovery was improper because the question whether the warrant application established administrative probable cause turns solely upon the sufficiency of the information contained in the application itself. Petitioners, in turn, moved to compel discovery. The district court granted the motion to compel discovery; the court subsequently denied the Secretary's motion to dismiss the counterclaim for want of jurisdiction. Pet. App. D1-D5.

The Secretary moved for certification for interlocutory appeal under 28 U.S.C. 1292(b) of the district court's determinations regarding the discovery

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[2] The subpoena duces tecum directed the OSHA safety supervisor to produce all writings, records, reports, charts, graphs, computer printouts, memoranda, statistical summaries, statistical data, and procedure manuals that support the allegations made in the warrant application or otherwise relate to the formulation and operation of OSHA's inspection plan (R. 49).

and jurisdictional issues. The district court granted the request but the court of appeals declined to permit the appeal. The district court then ordered the Secretary to comply with its discovery order; the Secretary again refused. Petitioners moved for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure. Pet. App. A1, E3.

The district court granted petitioners' motion, dismissed the contempt action, and awarded costs and attorney's fees to petitioners (Pet. App. E1-E5). The court also "granted a default judgment on [petitioners'] counterclaim," stating that "Mosher's allegations that OSHA's inspection plan is discriminatory and unreasonable shall be taken to be established as to Mosher" (*id.* at E5). It also "permanently enjoined [the Secretary] from inspecting or attempting to inspect Mosher pursuant to the inspection plan upon which the warrant is based" (*ibid.*).

2. The court of appeals reversed by a divided vote (Pet. App. A1-A12). The court held that "[t]he district court had no power to order discovery beyond the so-called 'four corners' of the warrant application" (*id.* at A3). Observing that " '[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention'—that is, within the four corners of the warrant application" (*ibid.*, quoting *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964)), the court found that "[t]he four corners rule logically applies to all warrants, criminal or administrative" (Pet. App. A3). That is because "the reviewing court is charged with examining the magistrate's actual probable cause determination—not what he or she might have concluded based on in-

formation not presented in the warrant application" (*id.* at A3-A4).[3]

The court also rejected petitioners' argument that the OSHA inspection plan is subject to independent review in an action to enforce a warrant. It noted that

> [t]he magistrate's probable cause determination in issuing an administrative warrant necessarily includes a review of the inspection plan on which the search is to be based. * * * The information presented to the magistrate unquestionably must be sufficient to satisfy that officer that he or she can properly assess the plan's neutrality. If this information is not sufficient, then the remedy is not to permit broad discovery beyond the scope of the warrant application by the employer on review—it is for the magistrate to deny the warrant in the first instance.

Pet. App. A5 (citation omitted). The court found that the "broad-based inquiry" sought by petitioners would "invite misuse of the warrant process mandated by the Supreme Court" (*ibid.*).

Judge Tuttle dissented (Pet. App. A7-A10). He stated that a court reviewing a warrant based upon an administrative search plan must "be granted full authority to examine the facts presaging the formulation and operation of the plan if they are not included as a part of the affidavit" (*id.* at A9). This

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[3] The court observed (Pet. App. A4 n.1) that an exception to this general rule was recognized in *Franks* v. *Delaware*, 438 U.S. 154 (1978), for situations in which the party challenging the warrant makes a specific showing that the warrant application contains deliberately or recklessly false statements. It noted that "[n]o *Franks* claim is raised here" (Pet. App. A4 n.1).

is because "[a] mere surface examination of the plan may not insure that the plan in its development and actual operation has been conducted in the 'reasonable' and 'neutral' manner required by the Supreme Court" (*id.* at A9-A10).

ARGUMENT

Petitioners contend that they should be permitted to challenge the Secretary's inspection plan on the basis of evidence that was not included in the affidavit attached to the application for the search warrant; their position is squarely at odds with this Court's conclusion in *Franks* v. *Delaware*, 438 U.S. 154 (1978), that information outside a warrant application generally cannot be considered in determining whether a warrant was justified by probable cause. The court of appeals' determination that this principle requires the rejection of petitioners' claim is correct and does not present a conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted. Indeed, just last Term this Court declined to review a claim identical to that presented by petitioners. See *Hackney, Inc.* v. *Brock*, cert denied, No. 85-874 (Mar. 24, 1986).[4]

1. The Occupational Safety and Health Act empowers the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act (29 U.S.C. 657(a)). In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court held that the Fourth

[4] The issue presented in this case is now pending in the United States Court of Appeals for the Eighth Circuit. *Donovan* v. *Trinity Industries, Inc.*, No. 86-1623 (docketed May 20, 1986).

Amendment requires the Secretary to obtain a warrant before he may conduct a nonconsensual inspection. The Court emphasized, however, that "[p]robable cause in the criminal law sense" is not needed to justify the issuance of a warrant (436 U.S. at 320-321 (citation and footnotes omitted)):

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

The Court stated that the requirement of a warrant would curb the "unbridled discretion" of enforcement personnel (*id.* at 323) without "impos[ing] serious burdens on the inspection system or the courts" (*id.* at 316).

The Secretary conducts two types of inspections under the Occupational Safety and Health Act: (1) inspections initiated as a result of specific evidence of a violation, which are termed "complaint" inspections; and (2) inspections pursuant to a general enforcement plan providing for periodic inspections of places of employment in order to detect health or safety violations of the statute, which are termed

"programmed" inspections (see *Barlow's*, 436 U.S. at 320-321 & n.17). In the present case, the application for the warrant was based on a general plan for programmed inspections under which OSHA focuses its limited enforcement resources on industries in which employees are subject to a high rate of injury.

As explained in the warrant application,[5] the Secretary's plan operates as follows. The plan identifies as "high rate" industries those industries in which one or more of the occupational injury incidence rates published by the Bureau of Labor Statistics is higher than the average injury rate for private sector industry as a whole. The agency compiles and disseminates to its area field offices a report for each state that lists—in descending order—the high rate industries for each state. The industries are classified by Standard Industrial Classification (SIC) Code and the agency obtains from Dun's Marketing Service a list containing the names and addresses of all establishments in those industries. Within each industry, establishments are listed by county according to size; all establishments that received a full-scope inspection within the previous fiscal year are deleted from the list. Finally, based on this ranking, each OSHA area office compiles an inspection register listing the establishments subject to inspection in the fiscal year. OSHA Instruction CPL 2.45A; OSHA Instruction CPL 2.25C. Within the yearly inspection cycle, establishments may be selected and inspected in any order "that makes efficient use of

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[5] At the time the warrant in this case was issued, programmed inspections were covered by OSHA Instructions CPL 2.25C (Empl. Safety and Health Guide (CCH) ¶ 4009 (1982)) and CPL 2.45A (Field Operations Manual (CCH), ch. II (1983)).

available resources." OSHA Instruction CPL 2.45A, Section E.2.a.(4). The Birmingham Area Office, which scheduled the inspection in this case, generally selects employers from the cycle list in descending order, taking into account geographic and other considerations (R. 11).

The magistrate determined that the facts set forth in the warrant application in this case established the probable cause required by this Court's decision in *Barlow's* (R. 27-28). The application provided a detailed explanation of the selection plan and included a copy of the plan itself as well as the OSHA safety supervisor's sworn statement that Mosher Steel was selected according to the provisions and procedures set forth in the administrative plan. The courts of appeals repeatedly have found similar applications sufficient to satisfy the administrative probable cause requirement. See, *e.g.*, *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, No. 85-874 (Mar. 24, 1986); *Donovan* v. *Wollaston Alloys*, 695 F.2d 1, 5 (1st Cir. 1982); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 988 (9th Cir. 1980); *Marshall* v. *Chromalloy American Corp.*, 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979). The court of appeals therefore correctly concluded that the magistrate had all of the information needed to determine whether the warrant application was supported by probable cause.[6]

Petitioners contend they should be permitted to challenge the validity of the Secretary's inspection

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[6] Because the district court dismissed the Secretary's contempt action and quashed the inspection warrant, that court did not address petitioners' challenge to the magistrate's probable cause determination. The court of appeals therefore remanded the case to the district court for further proceedings in accordance with its decision (see Pet. App. A7).

plan on the basis of evidence (which they hope to obtain through discovery) that was not before the magistrate who issued the warrant. To this end, they sought to inquire into, and the district court ordered discovery of, a wide array of documents relating to the inspection plan.[7] This Court considered a similar argument in *Franks* v. *Delaware*, *supra*. The issue in *Franks* was whether a defendant in a criminal proceeding could introduce evidence that was not considered by the magistrate who issued the search warrant in order to challenge the sufficiency of the showing of probable cause in the affidavit supporting the warrant. This Court stated that "[t]here is * * * a presumption of validity with respect to the affidavit supporting the search warrant" and held that the party challenging the validity of a warrant can go behind the facts set forth in the affidavit only if his claim is supported by "allegations of deliberate falsehood or of reckless disregard for the truth * * * accompanied by an offer of proof" (438 U.S. at 171).

The Court observed that several considerations weighed against permitting a party challenging a warrant to introduce evidence that was not before the magistrate who issued the warrant. In particular, it noted that the Fourth Amendment interests of the party challenging the warrant were "protected by [the] requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit" (438 U.S. at 166). In this connection it is relevant that "the magistrate already is equipped to conduct a fairly vigorous inquiry into the

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[7] Petitioners admit that the plan "on its face * * * appears to satisfy *Barlow's* requirement that the plan contain specific neutral criteria" (Pet. 10).

accuracy of the factual affidavit supporting a warrant application" (*ibid.*). The Court found that these and other considerations favoring the exclusion of evidence that was not considered by the issuing magistrate are outweighed only where the party challenging the warrant can make a substantial preliminary showing that the affidavit supporting the warrant contains deliberate falsehoods or statements made in reckless disregard of the truth.

Here, petitioners did not allege or show, and the district court did not find, that the safety supervisor acted with reckless disregard for the truth or made intentional misrepresentations in the warrant application. Moreover, petitioners provide no support for their bare suggestion (Pet. 10) that they may have been singled out for selective enforcement.[8] The rule set forth in *Franks* accordingly would bar the challenge to the inspection plan if *Franks* applies in this context. Indeed, the argument pressed by petitioners cannot be distinguished from the claim considered by the Court in *Franks*: petitioners too argue that evidence that was not before the issuing magistrate will undercut the magistrate's finding that the application for a warrant established probable cause.

Petitioners contend (Pet. 8, 11) that *Franks* does not apply here because the warrant was issued pursuant to the Secretary's enforcement plan rather than on the basis of an allegation of the existence of a statutory violation. However, the courts of appeals have uniformly concluded that *Franks* applies in the present context. Pet. App. A3-A5; *Donovan* v. *Hackney, Inc.*, *supra*; *Brock* v. *Gretna Machine & Iron*

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[8] As we have discussed, the affidavit in the warrant application stated that the Mosher Steel plant was selected pursuant to the inspection plan.

Works, Inc., 769 F.2d 1110 (5th Cir. 1985); *Marshall* v. *Milwaukee Boiler Mfg. Co.*, 626 F.2d 1339 (7th Cir. 1980).[9]

The considerations underlying *Franks*—including the interest in judicial economy and finality of magistrates' probable cause determinations—apply with equal force to justify a limit on challenges to probable cause determinations based upon administrative inspection plans. Moreover, the Occupational Safety and Health Act explicitly contemplates that the Secretary will exercise his inspection power "without delay." 29 U.S.C. 657(a)(1); see *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1372 (5th Cir. 1979). If employers are permitted to transform warrant enforcement proceedings into full-scale evidentiary hearings, complete with wide-reaching discovery far removed from the magistrate's narrow inquiry, every OSHA inspection could be subject to lengthy delays. Such extensive litigation over the inspection plan and selection process plainly is inconsistent with this Court's indication in *Barlow's* that the resources required by the warrant enforcement process would not "exceed manageable proportions" (436 U.S. at 321).[10]

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[9] Petitioners imply (Pet. 13 n.4) that Professor LaFave has reached a different conclusion, but the passage of his treatise cited by petitioners has nothing to do with the application of *Franks* to the administrative search context. A statement in the supplement to the treatise indicates that Professor LaFave believes that the magistrate's probable cause determination must be assessed by reference to the information contained in the warrant application. 3 W. LaFave, *Search and Seizure* § 10.2(d), at 128 & n.61.3 (Supp. 1986).

[10] The court of appeals observed that "given the general [judicial] acceptance of the so-called 'worst-first' inspection plan followed by the Secretary, [petitioners'] tactic may be

In addition, contrary to petitioners' assertions (Pet. 8), the court of appeals' decision neither conflicts with nor undermines *Barlow's* or its predecessors, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) and *See* v. *Seattle*, 387 U.S. 541 (1967). The magistrate's review of the inspection plan in the context of a warrant application provides full protection for employers' Fourth Amendment interests. *Barlow's* held that the probable cause standard is satisfied if the affidavit shows that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (436 U.S. at 321). As the court of appeals found (Pet. App. A5), a magistrate presented with the enforcement plan and the reasons for the selection of the particular employer must determine whether the *Barlow's* test has been satisfied. If he cannot conclude that the test is satisfied, he must deny the request for the warrant.

Petitioners' assertions (Pet. 11-12) that "meaningful review of the plan can only be accomplished by allowing full and free discovery" and that the decisions of the courts of appeals "will absolutely and totally prohibit employers from ever challenging the fairness and the constitutional reasonableness of the inspection plan" thus are obviously incorrect. Employers' Fourth Amendment rights are protected because the magistrate must conclude that probable cause under *Barlow's* has been established before he issues a warrant. Moreover, as in the present case, the magistrate's determination is subject to pre-enforcement judicial review on the basis of the ma-

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[a] calculated * * * deliberate impediment to enforcement" (Pet. App. A5-A6 n.2 (citations omitted)).

terials submitted with the warrant application. For these reasons, the court of appeals correctly held that petitioners may not go beyond the "four corners" of the warrant application in challenging the factual basis for the issuance of the warrant in this case.[11]

2. Petitioners erroneously contend (Pet. 11-12) that the court of appeals' decision conflicts with the decision of the Virginia Supreme Court in *Mosher Steel-Virginia* v. *Teig*, 327 S.E.2d 87 (1985). In that case, the court considered the validity of a warrant issued pursuant to the Virginia Occupational Safety and Health Act and concluded that the warrant application did not establish probable cause (327 S.E. 2d at 94). The state court adopted a state law standard governing the type and quantum of information that a state agency must present in order to establish administrative probable cause (*id.* at 93). Although this state standard obviously is inapposite here, most of the "specific facts" that the Virginia court required the state agency to include in a warrant ap-

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[11] The fact that petitioners dressed their challenge to the magistrate's probable cause determination in the procedural garb of a counterclaim attacking the validity of the inspection plan does not permit them to avoid this rule. As we have discussed, the probable cause determination necessarily encompasses consideration of the validity of the inspection plan; the counterclaim is simply an effort to circumvent the limitations imposed by *Franks* upon review of the magistrate's determination. It is not surprising that the court of appeals viewed "Mosher's tactic * * * [of] resistance to a search, coupled with a counterclaim and request for discovery on the inspection plan in the subsequent contempt proceedings [as] the latest 'stop OSHA' strategy" (Pet. App. A6 n.2). *Franks* plainly applies to the declaratory judgment claim as well, precluding consideration of materials that were not before the magistrate when the probable cause decision was made.

plication—*e.g.*, the criteria used to designate "high rate" industries, the method by which establishment lists are compiled, a description of the selection process, and the employer's inspection history—were contained in the application in the present case. In any event, the Virginia case concerns state law and cannot affect the requirements imposed by the federal statute.

Since the Virginia court held that the warrant application on its face did not satisfy the probable cause standard, the court's statement (327 S.E.2d at 92 (footnote omitted)) that an employer may "adduce[] evidence beyond the limits of the supporting affidavit" in challenging a warrant based on a general inspection plan is simply dictum. This is especially true because the court expressly declined to address a basic issue in this case—whether an employer may conduct discovery into the design and operation of the inspection plan (*id.* at 94). Finally, it is noteworthy that the court's dictum regarding the consideration of evidence not contained in the application for the warrant was preceded by a quotation from the Virginia Constitution's prohibition upon general warrants (see *id.* at 92); the court's conclusion therefore may rest upon its interpretation of the State Constitution rather than the Fourth Amendment. For these reasons, there is no conflict between the decision below and *Mosher-Virginia* warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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